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No. 82-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, et al.,
Petitioners,

v.

GROLIER INCORPORATED,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does Exemption 5 of the Freedom Of Information Act, 5 U.S.C. § 552(b)(5), permit the Federal Trade Commission to withhold documents containing "work-product" of Federal Trade Commission attorneys, when the lawsuit for which the work-product documents were created was terminated with prejudice several years earlier, and no related litigation exists or potentially exists?

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Grolier Incorporated[1] opposes the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 671 F.2d 553 and appears as Appendix A to the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit ("Petition for Certiorari").[2] The

[1] All of Grolier Incorporated's subsidiaries or affiliates are wholly owned by Grolier Incorporated or by its wholly owned subsidiaries.

[2] In addition, by order of April 9, 1982, a Statement Of Circuit Judges Wright And Wald On Petition For Rehearing was added as an amendment to the panel order of April 7, 1982, denying appellees' petition for rehearing. That order appears in Appendix C to the Petition For Certiorari.

opinion of the District Court is unofficially reported at 1980-2 Trade Cas. (CCH) ¶63,389 (D.D.C. June 13, 1980).[3]

STATEMENT OF THE CASE

This lawsuit arose out of a Freedom Of Information Act ("FOIA") request by Grolier Incorporated ("Grolier") on June 20, 1978, seeking disclosure of documents and records including, *inter alia*, "documents which refer or relate to a covert investigation of Americana Corporation and/or Grolier Incorporated, which was made in or about April 1973," by the Federal Trade Commission ("FTC").[4] The Commission initially denied Grolier's request in its entirety; however, following Grolier's administrative appeal of that denial, it released some documents while continuing to withhold others.

On May 3, 1979, Grolier filed this lawsuit seeking disclosure of documents withheld by the FTC. By letters of September 27 and 28 and October 5, 1979, the FTC released some additional documents. The FTC then moved to dismiss the complaint, alleging that the remaining undisclosed documents are exempt from disclosure.

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[3] An earlier district court opinion granting, *inter alia*, *in camera* review of documents "3", "5", "6" and "7", is unofficially reported at 1980-1 Trade Cas. (CCH) ¶63,188 (D.D.C. 1980) and appears as App. A, hereto.

[4] The investigation resulted in the filing of a civil penalty action by the government, entitled *United States* v. *Americana Corporation*, Civ. No. 388-72 (D.N.J.). Americana Corporation vigorously litigated that suit, and it was dismissed with prejudice on November 16, 1976, after the government refused to turn over documents pursuant to a discovery order. The documents involved in this appeal are among the documents which the court ordered be disclosed in the *Americana* litigation. Grolier contended in its brief to the Court of Appeals in this case that as a result of the discovery order in *Americana*, these documents were "available by law to a party other than an agency in litigation with the agency" and therefore were not exempt from disclosure pursuant to Exemption 5. The Court of Appeals did not, however, reach this issue, instead deciding this case on the grounds that in the context of the FOIA, the work-product privilege does not extend to documents created for litigation which has been terminated where no related litigation exists or potentially exists. In the event that certiorari is granted and the Court of Appeals decision is ultimately reversed, the case should be remanded to the Court of Appeals to consider the argument that Exemption 5 is inapplicable because the discovery order in the *Americana* litigation made the documents available by law to a party in litigation with the agency.

In its response to the FTC's motion, Grolier narrowed its request to seven documents. On February 21, 1980, the District Court granted the FTC's motion for summary judgment with respect to three of the documents. At that time, the court ordered *in camera* review of the other four documents, which are listed in the FTC's "Index to Documents" as documents "3," "5," "6," and "7"[5] to determine whether they contained attorney work-product that should be exempt from disclosure pursuant to Exemption 5 of the FOIA. *Grolier, Inc.* v. *FTC,* 1980-1 Trade Cas. (CCH) ¶63,188 (D.D.C. 1980). Following *in camera* review, the court granted the defendants' motion for summary judgment with respect to the latter four documents. *Grolier, Inc.* v. *FTC, 1980-2* Trade Cas. (CCH) ¶63,389 (D.D.C. 1980).

Grolier appealed from the grant of summary judgment with respect to six of the seven documents which the District Court held were exempt from disclosure. The Court of Appeals affirmed the District Court's judgment with respect to documents "1" and "4" on the grounds that those documents were exempt from disclosure under Exemption 5, since document 1 was a pre-decisional deliberative process memorandum and document 5 was a privileged attorney-client communication. However, it reversed the District Court judgment with respect to documents "3," "5," "6," and "7" and remanded the case to consider whether litigation related to the terminated action exists or potentially exists. If no such litigation exists or potentially exists, then the documents must be disclosed.

The Court of Appeals subsequently denied the FTC's petition for rehearing and its suggestion for rehearing *en banc.*[6]

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[5] The description of these documents contained in the FTC's Index to Documents is attached hereto as App. B.

[6] In response to the Petition For Rehearing And Suggestion For Rehearing En Banc Of The Appellees, Judges Wright and Wald filed an additional statement explaining that the majority opinion addressed the work-product privilege only. Appendix C to the Petition For Certiorari, pp. 17a-18a. The majority opinion did not address the deliberative process privilege, which is also encompassed under Exemption 5, because the government never raised that privilege with respect to documents "3," "5," "6" and "7" in any stage of the proceedings.

REASONS FOR DENYING THE WRIT

A. Disclosure Of The Documents Will Have No Detrimental Impact On The FTC In This Case.

The Petition for Certiorari in this case involves four documents generated for litigation which was terminated in 1976, and which cannot be revived. The documents discuss covert investigation techniques which have long been abandoned by the FTC. *Grolier Inc.* v. *FTC*, 671 F.2d 553, 557 (D.C. Cir. 1982). On the facts of this case, it is inconceivable that disclosure of these four documents would harm any legitimate governmental interest.

B. The Legal Standard Adopted By The Court Of Appeals Is Narrowly Confined And Will Affect Few Cases.

1. The Standard Is Limited To Exemption 5 Of The FOIA And Is Not Applicable To Civil Discovery Generally.

The legal standard adopted by the Court of Appeals for determining whether work-product documents are exempt from disclosure pursuant to the FOIA has no applicability to the work-product privilege generally. 671 F.2d at 556. As noted by the Court of Appeals, this follows for two reasons. First, unlike the civil discovery situation, with a Freedom of Information Act request "the presumption in favor of disclosure is at its zenith." *Id.* Second, in the context of civil discovery, courts may have been willing to extend the work-product privilege because of the qualified nature of the privilege and the ability of a litigant seeking discovery to overcome the privilege by demonstrating need. If the work-product doctrine were an unpenetrable protection against discovery, as it is under the FOIA, courts which extended the work-product privilege to include documents generated in terminated litigation, would not have done so. *Id.* at 556 n.6, *quoting United States* v. *Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

2. The Standard Is Applicable To A Narrowly Defined Factual Situation Which Will Arise Infrequently In FOIA Cases.

Petitioners argue that this decision will have a substantial detrimental impact for two reasons. First, they contend that every withholding of government records could be brought in the District of Columbia Circuit and that 38% of all FOIA suits brought in 1981 were filed in that Circuit. However, the total number or percentage of FOIA suits which are filed is irrelevant. The only critical question is the number of FOIA suits which have been filed seeking attorney work-product documents from terminated litigation where there is no existing or potential litigation. Since typically FOIA requests concern documents relating to on-going or potential litigation, the number of cases likely to be affected by the standard adopted by the Court of Appeals should be very small. In this respect, petitioner's assertion that FOIA requests might be filed for the purpose of determining whether sensitive investigations are underway is absurd. For the government to be harmed in this manner would require the unlikely combination of the following circumstances: (1) the party making the request already suspected that there was an investigation, but did not know whether it in fact existed; (2) work-product documents existing from previously terminated litigation; (3) a new investigation was underway which related to the terminated litigation; and (4) the investigation would be impeded by the public knowledge that it was being conducted.

Secondly, Petitioners contend that the rule adopted by the Court of Appeals would have a particularly "demoralizing" effect on government attorneys who are far more dependent on written files than their counterparts in civil practice because government cases last longer, government attorneys tend to be more transient, and because more coordination is necessary. Thus, Petitioners conclude that the quality and consistency of government litigation would suffer since much of what is now put down in writing would remain unwritten. However, the very pressures cited by Petitioners may compel government attorneys to continue writing down their thoughts and work despite potential disclosure. Moreover, Petitioners' argument

assumes that attorneys would be concerned about the disclosure of files from terminated litigation when there is no prospect for related litigation. Yet, as the Court of Appeals concluded:

> "When litigation has ended and no potential for related actions exists, concerns about possible inroads on the integrity of the adversary system greatly diminish. Indeed, 'where the work-product materials in question were prepared for a distinct and prior * * * litigation, long completed, the policies underlying the work-product privilege have already been achieved.' *In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D. Fla. 1977)." (*Grolier Inc. v. F.T.C.*, 671 F.2d at 556.)

Furthermore, many of the situations involving work product of government attorneys may still be exempt from disclosure pursuant to the deliberative process privilege which is incorporated in Exemption 5 of the FOIA. The Statement of Circuit Judges Wright and Wald on Petition for Rehearing explains that the majority opinion of the Court of Appeals did not address the applicability of the deliberative process privilege to the documents in this case, since the government never raised the issue. The deliberative process or executive privilege applies to predecisional documents reflecting advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated. *N.L.R.B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975). The implication of Judge Wald's and Judge Wright's statement is that if the government documents fall within the deliberative process exemption, as well as the work-product exemption, they need not be disclosed.[7]

[7] This Court held, in *N.L.R.B.* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 159-60, that the work-product rule covers material prepared by attorneys related to agency decisions, even though the material was not exempt from disclosure under the deliberative process exemption because it was not predecisional. Likewise, although not exempt from disclosure under the work-product rule as incorporated in Exemption 5, because the litigation for which the document was created has terminated and no related litigation exists or potentially exists, a document might still be protected by the deliberative process exemption if it is a predecisional memorandum concerning an agency decision.

Thus, both because the test espoused by the Court of Appeals is restricted to FOIA requests rather than discovery generally, and because the conditions for applying the test will seldom arise and when they do arise any adverse impact on government attorneys will be negligible and far outweighed by the public policy favoring disclosure, this case does not present important questions of law warranting review by this Court.

C. There Is No Direct Conflict Between The Circuits Because Every Previous Case Considering Whether The Work-Product Privilege Lapses Once The Litigation For Which It Was Created Has Ended Arose In The Context Of Civil Discovery.

As discussed above, the Court of Appeals expressly limited the decision in this case to Exemption 5 of the FOIA, stating that "we deal in this case, *not* with the civil discovery situation, but rather with a Freedom of Information Act Request." *Id.* at 556. Accordingly, the Court of Appeals held that *"in the context of an FOIA request,* attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists." *Id.* (emphasis added).

This case is the only reported case in any federal circuit or district court to consider whether the work-product rule as incorporated in Exemption 5 of the FOIA lapses once the litigation for which it was created has ended. Every other case discussing this issue arose in the context of civil discovery and not Exemption 5 of the FOIA.[8] Thus, there is no *direct* conflict

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[8] *See e.g., In re Murphy,* 560 F.2d 326 (8th Cir. 1977); *United States* v. *Leggett & Platt, Inc.,* 542 F.2d 655 (6th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977); *Duplan Corp.* v. *Deering Milliken, Inc.,* 540 F.2d 1215 (4th Cir. 1976); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz,* 509 F.2d 730 (4th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz,* 487 F.2d 480 (4th Cir. 1973), (*reversing Duplan Corp.* v. *Deering Milliken, Inc.,* 61 F.R.D. 127 (D.S.C. 1973)); *Republic Gear Co.* v. *Borg-Warner Co.,* 381 F.2d 551 (2d Cir. 1967); *Hercules Inc.* v. *Exxon Corp.,* 434 F.Supp. 136 (D.Del. 1977); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.,* 275 F.Supp. 146 (E.D.Pa. 1967); *Hanover Shoe, Inc.* v. *United States Shoe Machinery Corp.,* 207 F.Supp. 407 (M.D.Pa. 1962); *In re Grand Jury Proceedings,* 73 F.R.D. 647 (M.D.Fla. 1977); *United States* v. *O.K. Tire Co.,* 71 F.R.D. 465 (D. Idaho 1976); *Virginia Electric Power Co.* v. *Sun Shipbuilding & Dry Dock Co.,* 68

(Footnote continued on next page)

between this opinion and the reported opinions of any other Circuit Court of Appeals, or for that matter, with any other district court.

The fact that in the context of civil discovery other circuits have adopted a rule that the work-product privilege is perpetual, is not controlling in the context of the FOIA, since "the discovery rules can only be applied under Exemption 5 by way of rough analogies." *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86 (1973).

Several cases have applied a different test in determining whether "work-product" documents may be withheld from disclosure pursuant to Exemption 5 of the FOIA from the test applied in determining whether "work-product" documents are discoverable. For example, in *Guckian* v. *General Services Administration*, No. 75-2156 *memorandum opinion*, 38 Ad.L.2d 1061 (D.D.C. April 20, 1976), the court held that the work-product privilege was narrower under Exemption 5 of the FOIA than it is in the context of civil discovery, because under the FOIA, factual material must be disclosed, whereas in civil discovery, factual material is privileged but the party seeking discovery can overcome the privilege by showing need. The court explained:

> "*Even assuming that the reports were developed in anticipation of litigation and are work-product under Rule 26(b)(3) as defendants claim, it does not follow that the reports must be protected from disclosure under the (b)(5) exemption.* Defendants are correct in their assertion that the (b)(5) exemption was intended to include the attorney work-product privilege. NLRB v. Sears, Roebuck & Co., ___ U.S. ___, 95 S.Ct. 1504, 1518 (1975). *Defendant's*

(Footnote continued from preceding page)

F.R.D. 397 (E.D.Va. 1975); *United States* v. *International Business Machines Corp.*, 66 F.R.D. 154 (S.D.N.Y. 1974); *Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26 (D.Md. 1974); *Midland Investment Co.* v. *Van Alstyne, Noel & Co.*, 59 F.R.D. 134 (S.D.N.Y. 1973); *Wood* v. *Breir*, 54 F.R.D. 7 (E.D. Wis. 1972); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970); *Bourget* v. *Government Employee Insurance Co.*, 48 F.R.D. 29 (D.Conn. 1969); *La Rocca* v. *State Farm Mutual Automobile Insurance Co.*, 47 F.R.D. 278 (W.D. Pa. 1969); *Kirkland* v. *Morton Salt Co.*, 46 F.R.D. 28 (N.D. Ga. 1968); *Insurance Co. of North America* v. *Union Carbide Corp.*, 35 F.R.D. 520 (D. Colo. 1964); *Gulf Construction Co.* v. *St. Joe Paper Co.*, 24 F.R.D. 411 (S.D. Tex. 1959); *Tobacco & Allied Stocks, Inc.* v. *Transamerica Corp.*, 16 F.R.D. 534 (D.Del. 1954).

position, however, erroneously assumes that the (b)(5) exemption engulfs the entire work-product rule. Although the language of the (b)(5) exemption is broad enough to allow for an interpretation which would encompass all government documents, Congress and the courts have recognized that some limitation on the scope of the exemption is necessary in order to favor the goals of openness and disclosure which are at the heart of the FOIA.

"Congress chose to limit this exception by the application of the civil discovery rules, and the Supreme Court has made it clear that *the discovery principles are to be applied in exemption (b)(5) cases 'by way of rough analogies,' with the emphasis on furthering the purposes of the FOIA and the exemptions. Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86 (1973).[4] *Thus, the work-product rule, 26(b)(3) of the Federal Rules of Civil Procedure, works to bring documents within the scope of the (b)(5) exemption only when the application of that civil discovery rule would further the purposes underlying the act and exemption.*

"[4] It appears that some courts have interpreted the (b)(5) exemption to require a literal application of the civil discovery rules. E.G., *Brockway* v. *Department of Air Force*, 518 F.2d 1184 (8th Cir. 1975). This interpretation of exemption (b)(5) is unsatisfactory in light of the different purposes underlying the rules of discovery and the (b)(5) exemption. It is, however, unclear to this Court whether the court in Brockway was interpreting the (b)(5) exemption to require a literal application of the discovery rules in all cases, or whether it had determined that the purpose of the FOIA would be furthered by such a literal application in that particular case."

(38 Ad.L.2d at 1068.)

In *Fonda* v. *Central Intelligence Agency*, 434 F.Supp. 498 (D.D.C. 1977), the court followed similar reasoning in holding that documents claimed to be exempt from disclosure under Exemption 5 because they were attorney work-product should be examined *in camera* to determine whether the material was factual, since in the context of the FOIA, the work-product privilege does not apply to such factual material. The court stated:

"The Supreme Court has observed that, 'at best, the discovery rules can only be applied under exemption 5 by way of rough analogies,' since the FOIA context is not

completely analogous to civil litigation involving private litigants. *EPA* v. *Mink*, 410 U.S. 73, 86, 93 S.Ct. 827, 835, 35 L.Ed.2d 119 (1973). This observation is evidenced when one attempts to apply the attorney work product privilege outlined in Rule 26(b)(3) of the Federal Rules of Civil procedure in an FOIA context, a task that would challenge the fabled Procrustes. Rule 26(b)(3) speaks to the situation when one party seeks to discover materials prepared by the other party's attorney for the litigation in which they are engaged. It permits a certain amount of discovery of factual and tangible material upon a showing of special need in the litigation at issue. It never permits discovery of mental impressions, conclusions, opinions, or legal theories of an attorney. Since these rules cannot be dovetailed into the FOIA context, they must be applied in light of the policy underlying exemption 5.

"Fortunately, another Judge of this Court has already had occasion to examine the limits of the attorney work product privilege in the light of exemption 5. In *Guckian* v. *GSA*, Civil No. 75-2156, at 10-11, 38 Ad.L.2d 1061, 1068 (D.D.C. 1976), Judge Richey has held that the portion of the attorney work product rule subsumed into exemption 5 is that portion which protects from discovery mental impressions, conclusions, or legal theories of a Government attorney, the deliberations of counsel but not factual and tangible matter." (*Id.* at 505.)

The same reasoning process which was used in *Guckian* and *Fonda* is equally applicable to this case. As in those cases, the government asserts that the documents are exempt from disclosure pursuant to Exemption 5 of the FOIA, because they would be subject to a qualified privilege in the context of civil discovery. Furthermore, the government asserts that since no showing of need is permissible under the FOIA to overcome the privilege, the documents are not "routinely available" and are therefore exempt from disclosure pursuant to the FOIA. Yet, it is precisely because no showing of need is permissible under the FOIA to overcome the privilege, that the privilege must be more narrowly construed under Exemption 5 than it is in the context of civil discovery. Just as *Guckian* and *Fonda* held that

factual work-product material, which is normally subject to a qualified privilege in the context of civil discovery, must be disclosed despite Exemption 5 of the FOIA, here, work-product from terminated litigation, which other circuits have held is subject to a qualified privilege in the context of civil discovery, must also be disclosed where no related litigation exists or potentially exists.

Given that this decision is limited to the FOIA, whereas previous decisions of other circuits were in the context of civil discovery rules, and, given that the work-product rule under Exemption 5 is not identical to the work-product rule in the context of civil discovery, there is no conflict between the circuits warranting review by this Court.

D. There Is No Conflict Between The Decision Of The Court Of Appeals And Any Prior Decision Of This Court.

Petitioners assert that because the Court of Appeals distinguished the work-product rule in civil discovery from the rule under Exemption 5, "the court's decision squarely contravenes both the plain language and legislative history of Exemption 5 and its construction by this Court." Citing *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Federal Open Market Committee, Etc.* v. *Merrill*, 443 U.S. 340, 353 (1979). However, neither of those cases nor any other decision of this Court suggests that the standard for determining whether work-product documents should be disclosed must be identical under Exemption 5 to the standard used in civil discovery. Indeed, as discussed above, this Court held in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86 (1973), that "the discovery rules can only be applied under Exemption 5 by way of rough analogies."

In *NLRB* v. *Sears, Roebuck & Co.*, this Court stated that "it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context." 421 U.S. at 149. "Since the ability of a private litigant to overcome a privilege claim" in the civil discovery context may itself turn on his need, "it is not sensible to construe the Act to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is *the most compelling.*" Emphasis added.

Rather, "Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would 'routinely be disclosed' in private litigation." *Id.* at n.16.

This language does not necessarily lead to petitioners' conclusion that unless the documents would be available to any party in litigation with an agency regardless of need they may be withheld from disclosure pursuant to Exemption 5 of the FOIA. Rather, it merely states that one must not view a party requesting documents pursuant to the FOIA as in the same position as a private litigant with the *most compelling* need for discovery, since to do so would eviscerate the Exemption by making virtually every privileged document subject to disclosure.

When this Court in *Sears* specifically discussed the work-product rule as applicable to Exemption 5, the Court's statement of the rule was confined to those work-product documents which lie at the core of the rule which would not be subject to discovery even where need for the documents was demonstrated. The Court stated:

> "It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 and that such a privilege had been recognized in the civil discovery context by the prior case law .... Whatever, the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." (*Id.* at 154.)

Thus, the petitioner's assertion that every work-product document which might be privileged in civil discovery is necessarily exempt from disclosure pursuant to the FOIA, simply is not supported by *Sears*.

Similarly, *Federal Open Market Committee, etc.* v. *Merrill, supra,* does not support the contention that the work-product privilege under Exemption 5 is identical to the privilege in civil discovery.[9] The portion of that opinion cited by petitioners

[9] *FOMC* v. *Merrill* involved the deliberative process privilege and the privilege for confidential commercial information and not the work-product rule.

merely reiterates the language quoted above from *Sears*. More telling is discussion in that opinion of the privilege for confidential commercial information under Exemption 5. This Court stated that "federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information" (443 U.S. at 356) and concluded that the privilege is incorporated by Exemption 5 of the FOIA. *Id.* at 360. However, the Court explained that in the civil discovery context "the courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim for privacy against the need for disclosure." *Id.* at 362. Despite the above-quoted language from *Sears* and the fact that one does not consider the requestor's special need for disclosure under the FOIA, this Court held in *Merrill* that the qualified nature of the privilege required that it not be applied in every case where a trade secret claim might be upheld in civil discovery. Rather, only where the government would be significantly harmed by disclosure could it delay disclosure pursuant to Exemption 5. This Court explained:

> " 'The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection.' . . . We are mindful that 'the discovery rules can only be applied under Exemption 5 by way of rough analogies,' . . . and, in particular, that the individual FOIA applicant's need for information is not to be taken into account in determining whether materials are exempt under Exemption 5. . . . Nevertheless, the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure, should continue to serve as relevant criteria in determining the applicability of this Exemption 5 privilege. Accordingly, we think that if the Domestic Policy Directives contain sensitive information not otherwise available, and if immediate release of these Directives would significantly harm the Government's monetary functions or commercial interests, then a slight delay in the publication of the

> Directives, such as that authorized by 12 CFR § 271.5, would be permitted under Exemption 5." (*Id.* at 362-63; citations and footnotes omitted.)

Thus, none of this Court's previous opinions requires a literal incorporation of the rules of civil discovery in determining whether a document is exempt from disclosure pursuant to Exemption 5 of the FOIA. Moreover, while the need of the requestor may not be considered in determining whether documents must be disclosed, the harm to the government agency may be considered, and where that harm is minimal, documents subject to only a qualified privilege in civil discovery should be disclosed pursuant to an FOIA request. Here, the application of the standard adopted by the Court of Appeals would result in only minimal harm to the government, if it would result in any harm at all.

E. The Standard Adopted By The Court Of Appeals Most Appropriately Balances The Competing Policies Of The FOIA And The Work-Product Rule.

This Court recognized in *FOMC* v. *Merrill, supra,* that "the harm that would be inflicted upon the Government by premature disclosure, should continue to serve as relevant criteria in determining the applicability of this Exemption 5 privilege." 443 U.S. at 363. Here, the Court of Appeals determined that "[w]hen litigation has ended and no potential for related actions exists, concerns about possible inroads on the integrity of the adversary system greatly diminish [because] the policies underlying the work-product privilege have already been achieved."

While no other cases have explicitly considered whether the work-product privilege under Exemption 5 of the FOIA extends to documents generated in litigation which has terminated, other decisions have indicated that the fact that the dispute for which the documents were generated has ended would be relevant in concluding that the documents should not be exempt from disclosure.

For example, in *Martin Marietta Aluminum, Inc.* v. *Administrator, General Services Administration,* 444 F.Supp. 945 (C.D.Cal. 1977), the court considered whether private appraisers' reports which were furnished to the General Services Administration were subject to disclosure pursuant to an FOIA request. After explaining that there was a privilege from discovery for such reports, the court distinguished two cases in which such appraisals were ordered disclosed, on the grounds that in those cases the disclosure came after the sale was consummated and therefore could not harm the government.[10]

The court in *Martin Marietta Aluminum* held that under the FOIA it was required to consider the harm which would result from disclosure of the requested documents. Since in that case the harm would be significant, the documents were exempt from disclosure pursuant to Exemption 5. The court explained:

> "Courts appropriately exercise equity powers in deciding disputed exemption claims in FOIA cases. Guidelines for exercising those powers were succinctly set out by the Ninth Circuit:
>
> > In exercising the equity jurisdiction conferred by the Freedom of Information Act, the court must weigh the effects of disclosure and nondisclosure, according to

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[10] Plaintiff relied on *Tennessean Newspapers, Inc.* v. *Federal Housing Administration,* 464 F.2d 657, 660 (6th Cir. 1972), *aff'g* 341 F.Supp. 1013, 1015 (M.D.Tenn. 1971), and *Philadelphia Newspapers, Inc.* v. *Department of Housing and Urban Development,* 343 F.Supp. 1176, 1178 (E.D.Pa. 1972). The court rejected their argument stating that:

> "These cases, however, considered the release of an appraiser's report *after* a sale was consummated, a time when disclosure would not disrupt the governmental agency's decision-making process nor unduly hamper sales of government property. Thus, they are inapposite." (444 F.Supp. at 945.)

Similarly, in *Hoover* v. *United States Department of the Interior,* 611 F.2d 1132 (5th Cir. 1980) the court distinguished *Philadelphia Newspapers,* and *General Services Administration* v. *Benson,* 415 F.2d 878 (9th Cir. 1969) on similar grounds. The court in *Hoover* stated:

> "Most importantly, both cases involved disclosure requests for appraisals which were no longer being actively used by the government. As such, the asserted interest in protecting the government's bargaining position is, of course, nonexistent." (611 F.2d at 1140, n.10.)

traditional equity principles, and determine the best course to follow in the given circumstances. The effect on the public is the primary consideration.

"*General Services Administration* v. *Benson*, 415 F.2d 878, 880 (9th Cir. 1969). The court believes that the Government would be severely handicapped in attempting to sell property if potential buyers were routinely given pre-sale access to appraisers' reports prepared by or for governmental agencies.

"In this case, weighing the harm that would be suffered by plaintiff if disclosure is denied against the harm that would be suffered by the public if disclosure is granted, the court is satisfied that the equities favor the Government's decision not to disclose the information in question. Accordingly, the court holds that the withheld portions of the appraisers' reports fall within the exemption set out in 5 U.S.C. § 552(b)(5) and need not be disclosed to plaintiff before the sale of the equipment is consummated." (494 F.Supp. at 950.)

In *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854 (D.C.Cir. 1980), the court explained that the purpose for the work-product rule is to protect the adversary process:

"The purpose of the [work product] privilege, however, is not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person, but to protect the adversary trial process itself. . . . [T]he scope of the protection is limited, as Judge Wilkey made clear in *Jordan* [*Jordan* v. *U.S. Dep't of Justice*, 591 F.2d 753 (1978)]:

'The work-product rule does not extend to every written document generated by an attorney; it does not shield from disclosure everything that a lawyer does. Its purpose is more narrow, its reach more modest . . . [T]he privilege focuses on the integrity of the trial process itself . . . [which] is reflected in the specific limitation of the privilege to materials "*prepared in anticipation of litigation or for trial.*" ' " (617 F.2d at 864.)

Other courts have noted that "because the privilege obstructs the search for truth and because its benefits are, at best, 'indirect and speculative,' it must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.' " *In Re Grand Jury Proceedings*, 604 F.2d 798, 802 (3d Cir. 1979).

The documents which are subject to petitioner's appeal refer to an action brought by the federal government against a Grolier subsidiary several years ago, styled *U.S.* v. *Americana Corp.*, Civ. No. 388-72 (D.N.J.). That action was dismissed with prejudice on November 17, 1976, after the FTC disobeyed a court order to turn over certain materials to the defendants. Thus, the litigation for which these documents were created was terminated long before Grolier made its FOIA request, and there are no prospects that it will be reinstituted. In this situation, the policy reasons for exempting the attorney's work product from disclosure are much weaker than in the situation in which an attorney seeks to discover his adversary's thoughts about pending litigation. Here, the attorney need no longer fear that his opponent will get an unfair advantage by discovering his strategies prior to trial.

Not only are the policy reasons weaker for withholding documents from disclosure once the litigation has terminated, but the policy behind the FOIA also requires that the work-product rule be construed as narrowly as possible. The purpose of the FOIA is to encourage broad public disclosure of government documents. *Environmental Protection Agency* v. *Mink*, *supra*, 410 U.S. at 79; S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965); H.R.Rep. No. 1497, 89th Cong., 2d Sess., 12 (1966). Given the broad policies of disclosure under the FOIA and the fact that the reasons for applying the work-product rule are substantially diminished under the test adopted by the Court of Appeals, the standard adopted by the Court of Appeals appropriately balances the competing policies of the work-product rule and the FOIA.

Grolier acknowledges that there is a split of authority among the circuits in the context of civil discovery on the

appropriate test for determining whether work-product documents generated for unrelated litigation which has been terminated must be disclosed.[11] However, that split does not warrant this Court's review of the Court of Appeals' opinion, which is confined to the context of the FOIA.

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[11] Petitioner contends that there is no split in authority in the civil discovery context because no case actually held that material from a previous unrelated case was discoverable. This is simply untrue. As Moore's *Federal Practice* points out, the language used in many of the lower court opinions indicates that "the question as to whether the papers in one action were to be considered 'work-product' for purposes of a subsequent one, turned on whether the first action was complete and upon the relationship between the first and second actions." 4 J. Moore *Federal Practice* ¶26.64[2] p. 26-415 (2d ed. 1982). *See, e.g., United States* v. *International Business Machines Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974) (holding that work-product material is only privileged from disclosure in the specific litigation for which it was created, the court stating, "[a]lthough there is a split in authority on this point . . . this court is of the view that for something to be considered 'trial preparation material' 'work product' under Fed.R.Civ.P. 26(b)(3) it must be prepared 'in anticipation of litigation or for trial' in the case in which the special immunity accorded to such material is sought."); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D.Pa. 1970) ("An attorneys' memorandum in a prior case involving different parties does not have the protection of the 'work product' principle.").

CONCLUSION

For all of the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

[¶63,188] Grolier, Inc. v. Federal Trade Commission, et al.

U.S. District Court, District of Columbia. Civil Action No. 79-1215. Filed February 21, 1980.

Memorandum

FLANNERY, D.J.: This Freedom of Information Act ("FOIA") case comes before the court on cross-motions for summary judgment. The plaintiff seeks the disclosure of certain documents withheld by the Federal Trade Commission ("FTC"). The court will grant summary judgment on behalf of the FTC with respect to documents numbered 1, 2, and 4. *In camera* inspection will be ordered pursuant to documents numbered 3, 5, 6, and 7.

This case stems from an FTC investigation of Americana Corporation. The investigation took place in or about April, 1973. The plaintiff first requested access to all records or documents pertaining to the investigation on June 20, 1978.[1] The Commission denied the plaintiff's request by letter dated July 22, 1978. The Commission claimed that exemption five of the FOIA, 5 U.S.C. § 552(b)(5), precluded disclosure of the documents. The plaintiff appealed this denial on August 3, 1978. On October 12, 1978, the General Counsel granted in part the plaintiff's appeal request.[2] Upon exhausting administrative remedies, Grolier filed the instant action on May 3, 1979.[3]

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[1] The plaintiff's original request also sought all records and documents pertaining to covert investigations directed at Grolier Corp. and its subsidiaries. It further sought all documents appurtenant to any covert investigation by the FTC. These requests, designated as categories B and C in the index of documents, have been withdrawn.

[2] The General Counsel granted the release of 122 documents in full. He also authorized the release of factual portions of other documents. The FTC withheld 102 documents in whole or in part based on exemption five of the FOIA.

[3] The FTC released additional documents on September 27, 28 and October 5, 1979.

Discussion

This case presents the question whether seven documents withheld by the FTC fall within exemption five of the FOIA. 5 U.S.C. § 552(b)(5) states:

> (b) This section does not apply to matters that are—(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Exemption 5 "exempts those documents, and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). This exemption encompasses two categories: (1) the privilege for confidential intra-agency advisory opinions; and (2) the attorney-client and work-product privileges. *Id.*

The intra-agency advisory opinion privilege prohibits disclosure of memoranda and documents that reflect "intra-office advice on policy" and the "administrative reasoning process." It also exempts documents relied upon in determining a course of action. *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F.Supp. 939, 945-46 (Ct. Cl. 1958). Disclosure of such documents would injure the consulative process within the government.[4] *Id.* at 946.

The attorney-client privilege protects a client's confidential communications with an attorney concerning professional advice. *Mead Data Cent., Inc.* v. *U.S. Air Force*, 566 F.2d 242, 252 (D.C.Cir. 1977). The work-product privilege encompasses the work-product rule of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). The rule applies to memoranda prepared in contemplation of litigation. This includes an attorney's mental impressions, conclusions, opinions, or legal theories pertaining

[4] Memoranda falling within the advisory opinion category must be distinguished between documents that incorporate the deliberative, policy-making process, and memoranda containing factual material. *EPA* v. *Mink*, 410 U.S. 86, 89 (1973). Purely factual material contained in a deliberative memorandum is severable and discoverable. *Id.* at 87-88. But in some circumstances "the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by § 552(b)(5)." *Mead Data Cent., Inc.* v. *U.S. Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977).

to a particular litigation project. *Id.* at 511. Stated otherwise, exemption 5 subsumes the attorney work product privilege of Federal Rule of Civil Procedure 26(b)(3). *Mervin* v. *FTC*, 591 F.2d 821, 825 (D.C. Cir. 1978).

[*Index*]

Herein, the FTC has provided a detailed *Vaughn* v. *Rosen* index with accompanying affidavits. The index identifies document number one as evaluating litigation strategies. It pertains to trial preparation materials and to certain interrogatory answers. Document number two is a draft of document number one.

There is little question that these materials qualify as attorney work-product. This privilege, as explained above, protects from disclosure memoranda prepared in anticipation of litigation. Herein, the withheld portion of document number one[5] contains evaluations, opinions, and recommendations of the FTC pursuant to litigation preparation.

Document number four is a letter from the Secretary of the FTC to the Acting Chief, Consumer Affairs Section of the Anti-Trust Division of the Justice Department. The letter addresses the FTC's "decision as to the method of handling litigation in *U.S.* v. *Americana.*" This document qualifies as an attorney-client communication. It involves an agency's communications (FTC) with its attorneys at the Justice Department. See *Mead Data, supra,* at 252 (agency communication with attorneys constitutes attorney-client contact exempted under 5 U.S.C. § 552(b)(5)).

Documents 3, 5, 6, and 7 are memoranda discussing instructions and procedures relating to the investigation of Americana Corporation. The FTC claims that the work product privilege justifies nondisclosure of these materials. According to the FTC: document number 3 discusses trial preparation; documents number 5 and 7 encompass attorney thought processes; and document number 6 contains evaluations, opinions, and recommendations of counsel.

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[5] The FTC withheld document number two in full. This document constitutes an intra-agency communication. It is predecisional in that the document is a draft of a final memorandum that evaluates litigation strategies.

The court questions whether these documents qualify as work product. That evaluations, opinions, recommendations and thought processes can constitute work product is beyond dispute. But the key to the work product privilege is whether the FTC prepared such documents "with an eye toward litigation", *Hickman* v. *Taylor, supra,* at 394, or "in anticipation of litigation or for trial." Federal Rule of Civil Procedure 26(b)(3). As stated by Professor Wright:

> Prudent parties anticipate litigation and begin preparation prior to the formal commencement of an action. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

C. Wright, *Law of Federal Courts,* § 82 at 408-09 (1976).

It is unclear from the *Vaughn* index whether the FTC prepared the documents at issue with an eye toward the Americana litigation. The court therefore orders the FTC to produce these documents for *in camera* inspection. The Supreme Court in *EPA* v. *Mink, supra* at 93, expressly approved of this procedure. It noted that "if it [the agency] fails to meet its burden without *in camera* inspection, the District Court may order such inspection.

An appropriate Judgment accompanies this Memorandum.

APPENDIX B

"Doc. #3

"(5) November 13, 1973. One page. Memorandum *from* Wendell A. Reid, Consumer Protection Specialist, New York Regional Office, *to* the Division of Compliance, Bureau of Consumer Protection. This document contains instructions of Attorney Howerton relating to procedures to be used in investigating the practices of the Americana Corporation for trial preparation. It is exempt from disclosure as attorney work product.

"Doc. #5

"(5) June 29, 1973. One page. Memorandum *to* compliance file *from* Kent Howerton, Attorney. This memorandum indicates the contents of discussions in which instructions regarding the investigation of Americana Corporation were given by Attorney Howerton. The memorandum indicates Mr. Howerton's thought processes in the preparation of the case and is exempt from disclosure as attorney work product.

"Doc.

"(5) April 4, 1973. Two pages. A Memorandum *from* Kent C. Howerton *to* Alfred W. Cortese, Jr., Assistant Executive Director for Legal Coordination. This document contains an evaluation of the existing investigation of the Americana Corporation and recommendations related to obtaining additional evidence. It was prepared in contemplation of litigation and contains evaluations, recommendations, and opinions of counsel. It is exempt from disclosure as attorney work product.

"Doc. #7

"(5) April 3, 1973. One page. Memorandum *to* the compliance file in the Americana case *from* Kent C. Howerton, Attorney. It records actions taken by attorney Howerton in relation to the investigation of Americana's practices which resulted in the filing of a civil penalty action. This memorandum reveals the thought processes of the attorney preparing the Commission's case and is exempt from disclosure as attorney work product." (J.A. 61-63.)